MOHAMED SADIK MOHAMED ALI & ANOR v. MENTERI DALAM NEGERI & ORS

HIGH COURT MALAYA, KUALA LUMPUR
HANIPAH FARIKULLAH J
[JUDICIAL REVIEW NO: 25-22-01-2015]
3 FEBRUARY 2017

CONSTITUTIONAL LAW: *Citizenship – Registration – Application for extension of time to register births to obtain Malaysian citizenship under art. 14(1)(b) of Federal Constitution read together with s. 1(c) of Part II, Second Schedule – Whether applicants exceeded one year time limit in registration of birth – Time period of registration – Whether a mere procedural requirement – Whether applicants' substantive right to citizenship undermined on mere procedural requirement – Whether applicants' father a Malaysian citizen at time of applicants' birth – Whether applicants' mother holds permanent residence in Malaysia – Whether all necessary steps and measures taken to register birth of applicants – Whether applicants automatically Malaysian citizens by operation of law*

The applicants filed for judicial review for, *inter alia*, a declaration that the birth of the two applicants herein had been registered under s.1(c) Part II, Second Schedule of art. 14(1)(b) of the Federal Constitution ('Constitution') and they had attained citizenship by operation in law. The first applicant was born on 24 March 1980 in Thanjavur, India, while the second applicant was born on 15 December 1981 in India. The applicants had applied for an extension of time to register their births on 21 May 2014 to obtain Malaysian citizenship under art.14(1)(b) of the Constitution and read together with s.1(c) Part II, Second Schedule based on the facts that (i) the applicants' father was a Malaysian citizen *via* registration under art. 15(2) of the Constitution of the Federation of Malaya, Citizenship Rules 1960 since 12 May 1962; (ii) the applicants' mother was an India citizen who had married the applicants' father on 4 December 1975 and registered their marriage in Malaysia on 22 May 1985; and (iii) the marriage between the parents that was done on 4 December 1975 had been confirmed by Pejabat Agama Islam Petaling Jaya on 4 January 1993. The applicants' application for an extension of time to register their births was submitted to the first respondent who decided to reject the said application on the ground that the applicants had exceeded the one year time limit in their registration of birth. The applicants thus submitted that the first and second applicants qualified as citizens of Malaysia by operation of law pursuant to art. 14(1)(b) and s. 1(c) of Part II Second Schedule 2 of the Constitution. The Senior Federal Counsel however contended that the decision of the first respondent was reasonable and it is within his discretion whether to grant the extension of time or not.

Held (allowing application):

(1) Based on s. 1(c), Second Schedule Part II of art. 14(1)(b) of the Constitution, the requirements that an applicant must fulfil before he can be said to be a Malaysian citizen by operation of law are (i) he was born on or after Malaysia day; (ii) he was born outside the Federation; (iii) at the time of his birth, his father was a Malaysian citizen; and (iv) that his birth is registered at a consulate of the Federation within a year of its occurrence or within such longer period as the Federal Government may in any particular case allow. (para 17)

(2) Even though the details of when the application for the registration of the birth began was uncertain, the time period of the registration was a mere procedural requirement and should not overshadow the fact that by operation of law, the applicants were citizens of Malaysia. Hence, the respondents have erred by stating that the first respondent's discretion to disallow an extension of time for registering a birth in order to affect citizenship by operation of law was a non-reviewable matter. Doing so, the respondents were thereby undermining the applicants' substantive right to citizenship by operation of law on a mere procedural requirement. (paras 20 & 24)

(3) The respondents completely disregarded the substantive right of the applicants to citizenship and rejected an application for an extension of time by magnifying the failure to fulfil a procedural requirement. The fact that the reason for rejection given was that the applicants had exceeded the one year time limit in their registration of birth showed that the respondents did not take into consideration the substantive right of the applicants and allowed the non-compliance of the procedural requirement to be fatal. (para 24)

(4) The respondents had failed to take into account the fact that the applicants' father was a Malaysian citizen at the time of the birth of the first and second applicants; the applicants' mother held a permanent residence status in Malaysia and the applicants' parents had taken all the necessary steps and measures to register the births of the applicants. The two applicants were automatically Malaysian citizens by operation of law under art. 14(1)(b). (paras 25 & 26)

Case(s) referred to:

Foo Toon Aik v. Ketua Pendaftar Kelahiran dan Kematian, Malaysia [2012] 4 CLJ 613 HC ***(refd)***

Haja Mohideen MK Abdul Rahman & Ors v. Menteri Dalam Negeri & Ors [2007] 6 CLJ 662 HC ***(refd)***

Ku Luwante (An Infant) v. Government of Malaysia & Anor [1977] 1 LNS 49 HC ***(refd)***

Yong Lee Hua v. Director of National Registration Sabah & Anor [2011] 9 CLJ 125 HC ***(refd)***

Legislation referred to:
Federal Constitution, arts. 14(1)(b), 15(2), Second Schedule Part II s. 1(c)

For the applicant - Latheefa Koya & Raul Lee Baskaran; M/s Daim & Gamany
For the respondent - Lina Hanini Ismail; SFC

Reported by Suhainah Wahiduddin

JUDGMENT

Hanipah Farikullah J:

[1] The applicant filed for judicial review for the following reliefs:

(i) Suatu perintah *certiorari* untuk membatalkan keputusan responden pertama yang dimaklumkan melalui surat-surat bertarikh 3 November 2014 yang mana responden pertama telah memutuskan bahawa pendaftaran kelahiran pemohon-pemohon di bawah s. 1(c), Bahagian II, Jadual Kedua, Perkara 14(1)(b)) Perlembagaan Persekutuan bagi memperolehi taraf kewarganegaraan melalui kuatkuasa undang-undang tidak berjaya;

(ii) Suatu deklarasi yang mengiktirafkan bahawa kelahiran pemohon-pemohon didaftarkan di bawah s. 1(c), Bahagian II, Jadual Kedua, Perkara 14(1)(b)) Perlembagaan Persekutuan dan memperolehi taraf kewarganegaraan secara kuatkuasa undang-undang (operation in law);

(iii) Suatu perintah *mandamus* mengarahkan responden kedua untuk mengeluarkan kad pengenalan MyKad yang mengiktirafkan pemohon-pemohon sebagai warganegara Malaysia secara kuatkuasa undang-undang ("operation in law") di bawah Perkara 14(1)(b) dengan segera; dan

(iv) Suatu deklarasi bahawa responden-responden telah memungkiri hak asasi pemohon-pemohon dan hak-hak yang diperuntukkan di bawah Perlembagaan Persekutuan dan undang-undang lain yang memperuntukkan perkhidmatan atau faedah sebagai seorang warganegara Malaysia.

The Background Facts

[2] The relevant facts are as follows.

[3] The first applicant was born on 24 March 1980 in Thanjavur, India and the registration was done on 27 March 1980.

[4] The second applicant was born on 15 December 1981 in India and was registered on 12 January 1982.

[5] The applicants had applied for an extension of time to register their births on 21 May 2014 to obtain Malaysian citizenship under art. 14(1)(b) of Federal Constitution and read together with s. 1(c) of Part II, Second Schedule based on the reasons below:

(a) The applicants' father is a Malaysian citizen *via* registration under art. 15(2) Constitution of the Federation of Malaya, Citizenship Rules 1960 since 12 May 1962.

(b) The applicants' mother who was an Indian citizen had married the applicants' father on 4 December 1975 and registered their marriage in Malaysia on 22 May 1985.

(c) The marriage between the parents that was done on 4 December 1975 had been confirmed by Pejabat Agama Islam Petaling Jaya on 4 January 1993.

[6] The applicants' application for an extension of time to register their births was submitted by the second respondent to the first respondent on 21 May 2014.

[7] The first respondent had decided to reject the applicants' application on 24 September 2014 and a letter to inform the same to the applicants dated 3 November 2014.

Undisputed Facts

[8] The following facts are not disputed:

(i) the first applicant ("Mohamed Sadik") was born in Thanjavur District in India on 24 March 1980 to S.N. Mohamed Ali (father) and K.A. Najmunnisa (mother).

(ii) the second applicant ("Mazmeen") was born in India on 15 December 1981 to S.N. Mohamed Ali (father) and K.A. Najmunnisa (mother).

(iii) S.N. Mohamed Ali and K.A Najmunnisa were in a lawful marriage dated 30 January 2015.

(iv) S.N. Mohamed Ali is the father to both the first and second applicants.

(v) S.N. Mohamed Ali has been a Malaysian citizen since 12 May 1962 and as such was a Malaysian citizen at the time the first and second applicants were born.

Decision

[9] Learned counsel for the applicants submitted that the first and second applicants qualify as citizens of Malaysia by operation of law pursuant to art. 14(1)(b) and s. 1(c) of Part II Schedule 2 of the Federal Constitution.

[10] On the contrary, learned Senior Federal Counsel contended that the decision of the first respondent is reasonable and within his discretion whether to grant or not the extension of time.

[11] In support of the respondents' case, learned Senior Federal Counsel relied on s. 1(c) of Part II Second Schedule.

[12] Section 1(c) of Part II of the Second Schedule of the Federal Constitution provides as follows:

> 1. Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say;
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> Every person born outside the Federation whose father is at the time of the birth are citizen and whose birth is, within one year of its occurrence or within such longer period as the Federal Government may in any particular case allow, registered at a consulate of the Federation or, if it occurs in Brunei or in a territory prescribed for this purpose by order of the yang di-pertuan Agong, registered with the Federal Government; and
> …

[13] In this regard, the respondents contended that failure to comply with qualifications specified under s. 1(c) of Part II, Second Schedule, Federal Constitution and the refusal by the Federal Government to grant an extension of time would trigger the operation of provisions under Part III of the Federal Constitution by virtue of the phrase appearing at the beginning of s. 14(1) of the Federal Constitution "subject to the provisions of this part."

[14] In the High Court case of *Foo Toon Aik v. Ketua Pendaftar Kelahiran dan Kematian, Malaysia* [2012] 4 CLJ 613, Rohana Yusof J (now JCA) explained what "operation of law" means:

> It must be noted that art 14 read together with Second Schedule Part II s. 1(a) lays down the requisites of a citizen by operation of law in very clear term. A person who meets all the criteria therein would qualify to become a citizen under that provision. There is no room for an exercise of discretion under art. 14. Hence the argument of learned counsel that the respondent should weigh conflict of consideration between immigration policy and the welfare of a child simply cannot arise here, since there is no room for any discretion to be employed under art 14. The test to be applied is whether a person qualifies all the necessary requirements of art 14. Once the requisite conditions under these provisions are met it is automatic that a person is a citizen by operation of law.

[15] In the light of *Foo Toon Aik*'s case, there are two aspects to the acquisition of citizenship by operation of law. Firstly, there is no room for any discretion. Secondly, once all the requisite requirements are met, the person is automatically a citizen.

[16] Abdul Rahman Sebli J in the High Court case of *Yong Lee Hua v. Director of National Registration Sabah & Anor* [2011] 9 CLJ 125; [2011] 3 MLJ 684 held that whether or not a person qualified "as a citizen by operation of law is purely a question of fact." Once those facts are established, the respondents do not have discretion to decide whether or not citizenship should be granted.

[17] Based on s. 1(c), Second Schedule Part II of art. 14(1)(b) of the Federal Constitution are the requirements that an applicant must fulfil before he can be said to be a Malaysian citizen by operation of law are as follows:

i) he was born on or after Malaysia day;

ii) he was born outside the Federation;

iii) at the time of his birth his father was a Malaysian citizen; and

iv) that his birth is registered at a consulate of the Federation within a year of its occurrence or within such longer period as the Federal Government may in any particular case allow.

The First Applicant

[18] Requirements (i), (ii) and (iii) above are not disputed. Requirement (iv) was achieved on 21 April 1980 when the applicants' mother wrote a letter to the Office of the Assistant High Commissioner for Malaysia in Madras to register the birth of the first applicant. This occurred within a month of the first applicant's birth. Following that, the correspondence between the mother of the applicants and the Office of the Assistant High Commissioner for Malaysia shows that honest efforts were made by sending in all the necessary documents the consulate required. However, the Office of the Assistant High Commissioner never completed the application for the registration until 26 April 1989 when they replied stating that the application was not approved.

The Second Applicant

[19] The evidence shows that the father of the applicants had attempted to register the second applicant's birth on 10 September 1996 upon the second applicant returning to Malaysia with her family in 1984 (see in exhs. MSMA9, MSMA10 and MSMA11). The applicants' father had taken numerous steps between the birth of the second applicant in 1981 and September 1996 to apply for entry permits, including appeals to Immigration authorities and Ministry authorities. As such, the respondents' claims that no good reasons were given to substantiate a late registration of birth by the second applicant.

[20] Even though the details of when the application for the registration of the birth began is uncertain, I accept the applicants' submission that the time period of the registration is a mere procedural requirement and should not overshadow the fact that by operation of law, the applicants are citizens of Malaysia.

[21] In *Haja Mohideen MK Abdul Rahman & Ors v. Menteri Dalam Negeri & Ors* [2007] 6 CLJ 662, the plaintiffs similarly sought the declaration of citizenship under s. 1(c), Second Schedule, Part II of art. 14(1)(b) of the Federal Constitution for the two children born to a Malaysian father and an Indian (national) mother in Tamil Nadu, the court held as follows:

> (1) A cursory reading of art 14(1)(b) and Part II of the Second Schedule of the FC tends to suggest that the father must have two distinct 'qualifications' of equal importance. First, the father must be a citizen at the time of the child's birth and second, he must register the birth within one year or such longer period as the Federal Government may in any particular case allow (see para 17).
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> (2) But a closer examination of the provision yields to the construction that there is in fact only one primary qualification in the true sense that an applicant must satisfy to qualify as a citizen of this country, that is to say, that his father must be a citizen when he was born. The other 'qualification' is purely a secondary requirement that complements the primary qualification requiring the registration of the birth within a year, or such longer period as the Federal Government may allow. The process is purely a procedural requirement which requires the exercise of discretion on the part of the Government (see para 18).
>
> (3) […]
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> (4) In making a decision, the Federal Government would in fact be making a decision under a social contract between a citizen and the Federal Government. It must not unreasonably refuse to allow a longer period of registration bearing in mind that the infraction is only of a secondary rule of procedure. A refusal to allow a longer period may therefore provide a course of action by which the reasonableness of the minister's decision may be examined by the court. The Federal Government is bound to consider only the reason or reasons why he failed to register on time and a refusal may only be justified where the reason proffered was so unreasonable and unacceptable that it outweighs the second and third plaintiffs' right to citizenship. A rational decision based on a balance of justice should not allow a mere procedural non-compliance to undermine their substantive right to citizenship by operation of law (see paras 24, 26, 33).

[22] The second applicant's registration of birth was done out of the one-year period prescribed in s. 1(c) and that the discretion for the extension of time to register a birth lies with the Home Minister.

[23] In *Kuluwante (An Infant) v. Government of Malaysia & Anor* [1977] 1 LNS 49; [1978] 1 MLJ 92, Yusoff J held:

> The effect of section 2 of Part III of the Second Schedule of the Federal Constitution (ouster provision) which purport to preclude the jurisdiction of the court has been decided in a series of cases in our courts beginning with *Soon Kok Leong v. Minister of Interior, Malaysia* [1968] 2 MLJ 88 and recently in the decision of the court in *Mak Sik Kwong v. Minister of Home Affairs, Malaysia* [1975] 2 MLJ 168 and in the latter case, relevant authorities have been quite exhaustively dealt with. In those cases the courts have held that this ouster provision does not preclude the courts from entertaining an application for an order of *certiorari* to quash the decision of a statutory tribunal where there was an error of law apparent on the face of the record.
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> […]
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> For these reasons, I am of the view that in a proper case, the court is not precluded by reason of the 'ouster provision' only, to entertain a claim for declaration that an individual is a citizen. But whether the court would entertain a claim for declaration that the plaintiff is eligible for registration as a citizen under a relevant provision of the Federal Constitution, as it is sought in this case, involves different considerations and the court should also construe other provisions of the law relating to citizenship to determine the effect of such declaration.

[24] Hence, the respondents have erred by stating that the first respondent's discretion to disallow an extension of time for registering a birth in order to affect citizenship by operation of law is a non-reviewable matter. Doing so, the respondents are thereby undermining the applicants' substantive right to citizenship by operation of law on a mere procedural requirement. The respondents completely disregarded the substantive right of the applicants to citizenship and rejected an application for an extension of time by magnifying the failure to fulfil a procedural requirement. The fact that the reason for rejection given is that the applicants had exceeded the one-year time limit in their registration of birth shows that the respondents did not take into consideration the substantive right of the applicants and allowed the non-compliance of the procedural requirement to be fatal.

[25] It is clear that the respondents have failed to take into account the following:

(i) the applicants' father was a Malaysian citizen at the time of birth of the first and second applicants.

(ii) the applicants' mother holds permanent residence status in Malaysia.

(iii) the applicants' parents have taken all necessary steps and measures to register the births of the applicants.

Conclusion

[26] Based on the above reasons, in my view, Mohamed Sadik and Mazmeen are automatically Malaysian citizens by operation of law under art. 14(1)(b).